



Comptroller General
of the United States

Washington, D.C. 20548

153184

Decision

Matter Of: Horioka Enterprises, Inc. dba CleanServe

File No.: B-259483

Date: December 20, 1994

Laurence P. Lubka, Esq., Sedgwick, Detert, Moran & Arnold, for the protester.

DIGEST

The requirement that section 8(a) contracts be awarded at a fair market price does not preclude acceptance of a below-cost bid; the fair market price requirement imposes a ceiling, not a floor, for section 8(a) contracts.

DECISION

Horioka Enterprises, Inc. dba CleanServe protests the award of a contract to Customer Services, Inc. under Department of the Navy invitation for bids No. N63387-93-B-6625, issued as a competitive section 8(a) solicitation.

We dismiss the protest.

First, CleanServe contends that Customer Services did not offer a fair market price in that its price is too low. Generally, a protester's claim that a bidder submitted an unreasonably low price--or even that the price is below the cost of performance--is not a valid basis for protest. A bidder, in its business judgment, properly may decide to submit a price that is extremely low, Diemaster Tool, Inc., B-238877, Apr. 5, 1990, 90-1 CPD ¶ 375, and it is up to the agency to decide if the bidder can perform the contract at the offered price. See IWK Int'l Corp., B-237527, Feb. 21, 1990, 90-1 CPD ¶ 198.

The protester asserts, however, that acceptance of a below-cost bid would violate 13 C.F.R. § 124.211 (1994), which requires section 8(a) awards to be made at a "fair market price." This regulatory provision implements language that was added to section 8(a) of the Small Business Act by Public Law 99-661, § 921, 100 Stat. 3926-30. Under the heading, "Awarding of Contract at Fair Market Prices," § 921 added to section 8(a) the words "[a] contract may not be awarded . . . if the award . . . would result in a cost to the awarding agency which exceeds a fair market price." See 15 U.S.C. § 637(a)(1)(A) (1988). Thus, what the law imposed was a fair market price ceiling for section 8(a) awards and not a fair market price floor, and the Small Business Administration's (SBA) regulations in 13 C.F.R. must be read in this context. The Federal Acquisition Regulation (FAR) provisions dealing with section 8(a) contracting reflect this understanding. See

FAR § 19.806. Accordingly, we do not agree that the fair market price limitation in 13 C.F.R. precludes the protested award.

CleanServe next contends that Customer First's bid is nonresponsive because the company cannot "be prepared to fully commence work on the start date of this contract," and because the company does not meet all the "SIC [Standard Industrial Classification] requirements" of the solicitation. Although CleanServe characterizes this argument as going to the responsiveness of Customer First's bid, CleanServe is in effect only challenging Customer First's ability to perform in accordance with the solicitation. This challenge refers not to the responsiveness of the bid but to the responsibility of the bidder, which in the context of this section 8(a) procurement was determined by the SBA in the affirmative when it certified itself competent to perform. See 13 C.F.R. § 124.313. This is not a matter subject to our review.

The protest is dismissed.

Ronald Berger
Associate General Counsel